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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

HELMUT GAENSEL, Petitioner

V.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

18 U.S.C. §1014 makes it a crime to knowingly make any false statement or report, or to willfully overvalue any land, property or security for the purpose of influencing, in any way, a bank whose deposits are insured by the Federal Deposit Insurance Corporation. The jury convicted the Petitioner of knowingly overvaluing gems that he pledged as collateral for a loan.

The questions presented are:

1. If the factual basis for an indictment under 18 U.S.C. §1014 is that the actor overvalued collateral must the indictment contain the element of willfulness?

2. Does 18 U.S.C. §1014 provide sufficient notice to the would be offender as to what is actually proscribed?

3. Is the evidence in a §1014 prosecution sufficient if it shows that the actor had no personal knowledge of the value of the collateral that he was pledging for his loan?

4. Is an accused, in the context of a prosecution under 18 U.S.C. §1014, at a "tactical disadvantage" within the meaning of United States -vs- Lovasco, 431 U.S. 783 (1977) when the government is unable to produce at the time of trial the collateral that the actor allegedly overvalued to obtain the loan?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the Ninth Circuit Court of Appeals were Petitioner, Helmut Gaensel, (appellant below) and Respondent, The United States of America (respondent below). In the trial court (The United States District Court for the District of Montana) the parties were the Petitioner (then the defendant) and the Respondent (then the plaintiff).

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

HELMUT GAENSEL, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner Helmut Gaensel respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals which affirmed his conviction under 18 U.S.C. §1014 for making a false statement in the context of a loan transaction with a bank whose deposits are insured by the Federal Deposit Insurance Corporation.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (unpublished) and the pertinent District Court ruling adopted therein are reproduced in the Appendix, attached hereto, marked as A-1 – A-12.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals, entered on January 30, 1989, affirmed Petitioner's conviction under 18 U.S.C. §1014. The jurisdiction of the Court is invoked under 28 U.S.C. §1254 (1).

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

This petition raises issues that involve the United States Constitution, First, Fifth and Sixth Amendments and 18 U.S.C. §1014 which provides as follows:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any . . . loan . . . shall be fined not more than $5,000.00 or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

A. Procedural Summary

By indictment filed on June 17, 1987, the Grand Jury charged the Petitioner with one count of knowingly making a false statement in connection with a loan transaction. The factual basis for the charge was that on June 29, 1982, the Petitioner represented to the loan officer that assorted gem stones, which he pledged as collateral for the loan, had a value of $700,000.00 when in fact, the gem stones had an actual value of only $7,000.00 [CR 2.][1] The

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[1] "CR" refers to the Clerk's Record the designation "RT" refers to the Reporter's Transcript on appeal.

jurisdiction of the district court was invoked under 18 U.S.C. §3231. The indictment is set forth in the appendix at A-13 – A-14.

Prior to the trial, Petitioner moved to dismiss the indictment because it did not state an offense against the United States. The trial court denied the motion. [A-5 – A-7]. This motion was renewed after trial upon a motion to arrest judgment under Rule 34 of the Federal Rules of Criminal Procedure, which was also denied, in a Memorandum and Order dated February 3, 1988, [CR 78.]. The Ninth Circuit affirmed the denial. [A-2.]

Petitioner also argued before the trial, on a motion to dismiss, that 18 U.S.C. §1014 is unconstitutional because it is vague and overbroad; that motion was denied as well. [A-7 – A-8.] Moreover the Ninth Circuit Court of Appeals summarily rejected Petitioner's challenge to the constitutionality of 18 U.S.C. §1014. [A-3.].

Also the Petitioner urged that the evidence was insufficient to convict him. This motion was raised before trial in the context of a motion to dismiss [CR 37, 38 & 39]; during trial upon oral motions under Rule 29 of the Federal Rules of Criminal Procedure [RT pp. 140-142, 204-205] and again post-trial by way of a written motion for judgment of acquittal, also under rule 29 [CR 67, 69]. Each of these motions was denied. Indeed the Ninth Circuit Court of Appeals affirmed and ruled that the evidence was sufficient. [A-3].

Furthermore Petitioner urged that he was at a "tactical disadvantage" within the meaning of United States -vs- Lovasco, 431 U.S. 783 (1977) because of substantial pre-indictment delay and the government's consequent inability to produce the gems at the time of trial for appraisal by the defense. Alternatively Petitioner argued to the trial court, and then again on appeal, that the government's evidence of the value of the gems should have been suppressed since the United States had failed to seize the collateral in question. The motion to suppress was denied in the trial court. [A-10]. Again that ruling was affirmed by the Ninth Circuit. [A-3].

Petitioner's jury trial commenced on Monday, November 30, 1987. The case was sent to the jury on Wednesday, December 2, 1987. At 1:10 p.m. on Wednesday, December 2, the Court received a communication from the jury stating: "This jury is unable to reach a unanimous decision." [CR 54, 55.]. After discussion and suggestions from counsel, the Court responded to the jury's report of deadlock. Counsel for the Petitioner, although agreeing with the content of the response, objected on the ground that the Court should have immediately declared a mistrial.

Subsequently, the Court received two more communications from the jury resulting in the reading of portions of the transcript in open court. The jury again retired to the jury room to deliberate.

At 6:00 p.m. on December 2, 1987, the jury was called back into open court with the instruction that they would be dismissed for the evening and to return to continue deliberations at 9:00 a.m. the next morning. The jury then returned a verdict of guilty at approximately 9:15 a.m. on December 3, 1987.

The Petitioner was sentenced in the trial court on May 17, 1988. It was the judgment of the Court that the Petitioner be committed to the custody of the United States Attorney General for a period of two years with all but six months of that time being suspended with four years of probation to follow. Furthermore the Petitioner was fined $5,000.00 and ordered to make restitution to the bank. In conjunction with the sentencing, the Petitioner made a motion for a recommendation against deportation under 8 U.S.C. §1251 (b). The motion was denied by the trial court and that denial was affirmed by the Ninth Circuit Court of Appeals.

B. Factual Summary

The Petitioner is a German national and a mining engineer. He has engaged in mining operations throughout the world. During 1986 and 1987 Petitioner focused

his attention on mining operations in South America and the United States. He designed a plan whereby a mine located at Virginia City, Montana, would be rehabilitated so that it could process mining extracts from mines that the Petitioner had access to in South America. The raw materials from the South American mines were to be transported to Montana for processing.

In order to fund this business venture the Petitioner's company entered into a series of loan transactions with the Missoula Bank of Montana. Petitioner guaranteed payment of these loans personally. By June 29, 1982, the Petitioner owed the bank $255,000.00

As collateral for these loans the Petitioner pledged stock in his company and some gem stones that were obtained by his company in a previous business transaction. The value of these gem stones formed the basis for the prosecution.[2]

The evidence at trial showed that Petitioner pledged the gems as collateral for the loan and that $700,000.00 was discussed as a relative value for them. However, the banker who accepted the gems as collateral testified that the Petitioner explained that he had actually obtained the gems in a previous business deal and the person who gave them to him [Petitioner] told him that the gems were worth $700,000.00. The person from whom the Petitioner obtained the gems in the first instance remained unidentified at the trial. The testimony basically showed that the Petitioner delivered the gems to the bank as collateral and said take these gems as security for the loan, I obtained them in a previous business deal and the person who gave them to me told me that they are worth $700,000.00.

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[2] The stock that Petitioner pledged was worth $700,000 at the time the loan was made (RT, P. 39) but had no marketability after Petitioner's loan went into default (RT, P. 41). This was not Petitioner's fault.

REASONS FOR GRANTING THE WRIT

PREFACE

The prosecution from which this petition derives involves the interpretation and application of 18 U.S.C. §1014. There is very little appellate level case law that analyzes this statute and the cases that do treat § 1014 are either in conflict, or not really in point in terms of the issues raised herein.

In this connection we respectfully advise the Court that although our issues are set forth under four separate headings each of these issues is in some manner related to one central theme. What does §1014 proscribe and what are its proof requirements?

To answer these questions we are sorely in need of this Court's guidance. Against this background we now argue as follows:

I.

THE INDICTMENT IN THIS CASE DOES NOT STATE AN OFFENSE AGAINST THE UNITED STATES OF AMERICA BECAUSE IT DOES NOT ALLEGE THAT THE PETITIONER "WILLFULLY" COMMITTED THE CRIME.

In pre-trial papers we moved for dismissal of the one count indictment on multiple grounds. Critical to our pre-trial effort was the legal concept that 18 U.S.C. §1014 contains two distinct offenses that are measured by different mens rea requirements. It was our contention in the courts below, and it remains our contention here, that 18 U.S.C. §1014 proscribes two different kinds of conduct.

First §1014 says that if a person "knowingly" makes a false statement to influence a bank whose deposits are insured by the Federal Deposit Insurance Corporation [FDIC] then criminal responsibility may attach. Moreover §1014 goes on and by use of the disjunctive coordinator

"or", says that any person who "willfully" overvalues any land, property or security, for the purpose of influencing an [FDIC] bank can be held criminally responsible as well. The indictment in this case does not contain either of these offenses.

The factual basis for the filing of the indictment was that the Petitioner overvalued security in connection with the loan transaction. Consequently to convict under §1014 the United States had to plead and prove the element of willfulness. Since the indictment lacks this element it follows that it does not state an offense against the United States.

The trial court and the court of appeals summarily dismissed this argument and held that in any case the Petitioner knowingly made a false statement that fell within the purview of §1014. We now note what appears to be a conflict between the Second Circuit and the Eleventh Circuit on this particular point.

In United States -vs- Davis, 730 F.2d 669 (11th Cir. 1984) the defendant was charged in certain counts of an indictment with the willful overvaluation of property under 18 U.S.C. §1014. The government's theory was based on the fact that Mr. Davis did not own three pieces of equipment that he listed on his loan application and that such listing necessarily established a willful overvaluation since the property could have no value as security for the loan. However, Mr. Davis argued that although the designation of property not owned as an asset on a financial statement could constitute a false statement it should not have been characterized as a willful overvaluation of property.

The Davis Court agreed that an item claimed as an asset in a financial affidavit does not automatically constitute an overvaluation of the property. The Court's conclusion was predicated on the language of 18 U.S.C. §1014 which specifies that the act of knowingly making a false statement is not the same as the act of willfully overvaluing collateral. Moreover, said the Davis Court, it is clear from §1014 that the definition of false statements cannot

be routinely equated with that of willful overvaluations. Citing Reiter -vs- Sonotone Corp., 442 U.S. 330, 339, the Davis Court held that canons of construction ordinarily suggest that terms connected by a disjunctive coordinator be given separate meanings, unless the context dictates otherwise. Thus the Court held just because a person does not own a claimed asset does not mean that is has been overvalued.

False statements of ownership are misrepresentations of fact, not willful overvaluations. Only where a declarant asseses an inflated value to property that he actually owns can he be guilty of an overvaluation. Only by a strained reading of the statute can a false assertion of ownership be labeled as an overvaluation. Consequently Mr. Davis convinced the Eleventh Circuit that false statements "knowingly" made are different from overvaluations of property that are "willfully" made. In the Second Circuit however the distinction between a knowing false statement and a willful overvaluation is not given the same dignity.

In United States -vs- Thibadeau, 671 F.2d 75 (2nd Cir. 1982) the defendant made the following false statements; that the vehicle he was purchasing was new, when in fact it was not; that the vehicle was purchased from a certain entity when in fact it had not been so purchased; that a cash down payment of $2,000.00 was made when in fact no down payment was made; and that the purchase price was $6,950.00 when in fact that was not the purchase price. The defendant admitted that all of the statements were false but argued that the representation regarding the purchase price on each document was not a false statement but was an overvaluation of the vehicle. Consequently the defendant went on to urge that the government was under an obligation to charge him under the second clause of §1014. Mr. Thibadeau's argument was that the inflated purchase price was in fact an overvaluation and that without the element of willfulness the indictment was defective to that extent.

The Thibadeau Court rejected the argument and held that the government was not required to allege the worth

of the vehicle that was overvalued. Indeed the Thibadeau Court specifically held that the government could prove that the statement as to the purchase price in each case was simply false even though the purchase price of the vehicle may have been inflated which would have caused a violation of the overvaluation clause of §1014.

Thus Davis seems to draw a bright line between the false statement clause and the overvaluation clause of §1014, whereas Thibadeau generally stands for the proposition that even if an overvaluation occurs the government need not allege it since all overvaluations are by definition false statements.

The indictment must set forth all the essential elements of an offense in order to apprise the defendant of the charge he must meet and to protect against double jeopardy. The failure of an indictment to detail each element of the charged offense generally constitutes a fatal defect. United States -vs- Keith, 605 F.2d 46, 464, (9th Cir., 1979). If willfulness is an element of the crime and it is not alleged then the indictment is constitutionally defective. United States -vs- Kurka, 818 F.2d 1427, 1430-31 (9th Cir. 1987).

In United States -vs- Mekjian, 505 F.2d 1320 (5th Cir. 1975) the Court reversed a conviction under 18 U.S.C. §1001 because the indictment did not charge the element of willfulness. After recognizing the proof distinctions between knowingly and willfully, (id at 1324), the Mekjian Court concluded that the missing element could not be implied. Furthermore said the Court, where an essential element is omitted even if the trial court instructs the jury on the missing component this will not cure the error. This is because if the trial court supplies the missing element by way of instruction there is still no telling whether the Grand Jury would have returned an indictment in the first instance. (id ad 1325).[3]

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[3] This is particularly true here where we do not know whether the grand jury would have indicted Petitioner considering the more demanding mental state of "willfulness."

In this case both the trial court and the appeals court refused to recognize the substantive distinction between knowing false statements and willful overvaluations. For this reason Petitioner was convicted of the hybrid offense of knowingly overvaluing security. This is not an offense against the United States and it denied Petitioner his constitutional right to be charged by Grand Jury indictment. For these reasons the writ should issue.

II.
18 U.S.C. §1014 IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE AND OVERBROAD

On brief to the trial court and the court of appeals we argued that §1014 is unconstitutional because it is vague and overbroad. Support for this conclusion can be found in Williams -vs- United States, 458 U.S. 279, (1982). In dicta this Court held that §1014 is ambiguous and that Congress failed to appreciate the statute's claimed scope. (id at 290.)

To illustrate we suggested that §1014 applies to a broad range of speech that it was never intended to cover. For instance a customer who flatters a lending officer when applying for a loan by telling him that he is intelligent and that he dresses well theoretically is guilty of a §1014 violation if the remarks are insincere. So also the credit reference, who exaggerates the bad points about the loan applicant's credit history thereby convincing the bank not to lend money can be found guilty as well.

The point is that under the statute it does not matter how remote the falsehood is because reliance by the bank need not be shown. Kay -vs- United States, 303 U.S. 1, (1938) holds that whether a bank would not have acted favorably on the loan is irrelevant. Accord in the context of a §1014 prosecution See United States -vs- Kennedy, 564 F.2d 1329, 1340 (9th Cir. 1977) cert. denied, sub. nom., United States -vs- Meyers, 435 U.S. 944, (1978).

In the same connection Petitioner complains that 18 U.S.C. §1014 is vague because a person of ordinary

intelligence does not know what has the capacity to influence the bank. The trial court admitted that there is room for argument that §1014 is overbroad[A-8]. However, said the trial court, the overbreadth claim is specious because case law requires that the false statement be material.

The problem with this, however, is how do you determine what is material? Is the standard objective or subjective? We argued that the test of materiality must be objective for the statute to make sense. And indeed each and every banker who testified, to include the one who made the loan in this case, said that no reasonable banker under the circumstances would have lent the money in this case on the strength of the statements that the Petitioner made. Therefore we repeatedly urged under Rule 29 of the Federal Rules of Criminal Procedure that as a matter of law the statements were not material.[4]

We reference the Rule 29 motions here only to show that despite overwhelming evidence that a reasonable banker would not have allowed the Petitioner's statements to influence the transaction, the trial court allowed the case to go to the jury on the strength of testimony from the lending banker saying that the Petitioner's statements of gem value were considered by him in making the loan. Thus, we have a case where the lender commits a gross deviation from standard banking practices with a resulting conviction based on that particular lender's reliance on some very unreliable information.

This brings us full circle. We are back to the illustration of the customer who disingenuously flatters the loan officer. According to the courts below it does not matter if one hundred bankers agree that flattery from the customer should never be considered in making a loan. As long as the banker who made the loan says he considered the flattery the accused can be prosecuted and convicted.

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[4] Denial of the Rule 29 motions is discussed in the context of our deficiency of the evidence argument which is set forth below.

§1014 is vague because a person of ordinary intelligence cannot determine what may influence a bank in the context of a banking transaction. Furthermore §1014 is overbroad because it arguably applies to a broad range of speech that is not criminal character. Moreover the concept of materiality could serve to narrow the sweep of the statute, however, there are no decisions that supply the criteria to guide us in that effort.

This case is evidence that §1014 can be unconstitutionally applied because the trial court allowed the case to go to the jury despite clear evidence that no reasonable banker under the circumstances would have made the loan. For these reasons the writ should issue.

III.

THE EVIDENCE IN THIS CASE WAS NOT SUFFICIENT TO CONVICT BECAUSE THE PETITIONER HAD NO PERSONAL KNOWLEDGE OF THE VALUE OF THE GEMS THAT HE PLEDGED AS COLLATERAL FOR THE LOAN.

The evidence at trial showed that the Petitioner borrowed money and that he pledged, among other things, gems as collateral for the loan [RT p. 41, ls. 12-20]. We conceded these facts in our opening statement [RT p. 14, ls. 4-16]. However we also maintained, and proved, that the Petitioner disclaimed any personal knowledge of gem value. The banker who made the loan admitted that the only thing the Petitioner told him about the gem value was that he [the Petitioner] had received the gems through an exchange of property and that the person who gave him the gems told him they were worth $700,000.00 [RT p. 62, ls. 24-25 & p. 63, ls. 1-23].

From these record excerpts it will be seen that the Petitioner never made any representations of gem value that were intended to influence the bank. There is a significant difference between:

These gems are worth $700,000.00; and

I got these gems in exchange for some property and was told by the person who gave them to me that they are worth $700,000.00.

There is no evidence in the record that shows that the Petitioner did not receive the gems in a previous business transaction. The third party who allegedly told the Petitioner that the gems were worth $700,000.00 remained unidentified at the trial [RT p. 75, ls, 4-14].

By merely parroting a value that someone else told him the Petitioner displayed no intent to influence the transaction through deception. Whether the Petitioner reported a value of 7 dollars or 7 million dollars is irrelevant. The facts show that he took no personal responsibility for that value. He lacked the specific intent to commit the offense.

Furthermore no one from the bank ever inventoried the gems that the Petitioner delivered. The lender testified that he never did, [RT, p. 75, ls. 21-23]; and the bank auditor who handled the gems later said there really was no way to determine how many gems came into the bank originally [RT p. 106, ls. 18-22]. Moreover, the bank's president, who was subpoenaed by the defense, said that there was no way to tell how many times the gems left the bank because the records that she produced showing how the gems were handled did not go back to the time when the gems were taken into the bank originally [RT p. 186, ls. 12-14].

Also the government's own appraiser said that when he got the gems in 1984 many of the paper containers for the gems were folded "all different ways"; and when examined further on this point the appraiser said when papers are not folded properly gems can get lost [RT p. 121-122]. Also the government's appraiser said there were discrepancies between the gems described on the paper containers and what was inside the container. The appraiser outright admitted that it was "very possible" that certain gems could have existed at one time and were simply never delivered to him for appraisal [RT p. 123, ls. 11-15].

Lastly on this argument we point out that each and every banking person who testified, to include a defense expert, [RT pp. 188-194], said that the loan was a mistake. The United States agreed that no reasonable banker would have made the loan [RT p. 223, ls. 11-2]. This means that the report on value that the Petitioner made had no intrinsic capacity to influence the decision to make the loan. Therefore it is unfair to infer that the Petitioner intended to influence the transaction because the lending banker relied on, or was influenced by, the Petitioner's reported value. If four bankers assumed the witness stand and said that the Petitioner's reported value would have been a significant factor in deciding whether to make the loan we could infer from that fact that the Petitioner harbored the intent to influence.

However, to be fair, the corollary of that statement must also be true. If the four bankers said that no reasonable banker would have taken Petitioner's reported value into consideration in making the loan then it must be concluded as a matter of law that there was no intent to influence. For these reasons the writ should issue.

IV.

THE PETITIONER WAS AT A "TACTICAL DISADVANTAGE" WITHIN THE MEANING OF UNITED STATES -vs- LOVASCO, 431 U.S. 783 (1977) BECAUSE THE GOVERNMENT WAS UNABLE TO PRODUCE, AT THE TIME OF TRIAL, THE GEMS THAT THE PETITIONER ALLEGEDLY OVERVALUED TO OBTAIN THE LOAN.

Lack of access to evidence can constitute a "tactical disadvantage" within the meaning of United States -vs- Marion, 404 U.S. 307, (1971). Marion says that the legislatively enacted statute of limitations provides the primary guarantee against pre-indictment delay, however, delay is also tested by general principals of due process. (id at 324.)

If a defendant can show "substantial prejudice" and that the government intentionally, or recklessly, delayed to gain a tactical advantage over the accused, due process might be violated. (Id at 324.) Good faith investigative delay, even if it causes some prejudice, does not violate due process principals. United States -vs- Lovasco, 431 U.S. 783, (1977). Under these standards, and upon the record in this case, a due process violation occurred. We offer the following argument in support of this conclusion.

The crime in this case was allegedly committed on June 29, 1982, [CR 2]. The indictment was filed on June 17, 1987, just 13 days before the five year statute of limitation would have expired under 18 U.S.C. §3282. The Federal Bureau of Investigation, [FBI], was working on the case in early September of 1982. The record shows that the FBI interviewed the banker who made the loan in this case during that time. Consequently we know that the government was apprised of the essentials of its case in early September of 1982.

Yet according to the "prosecutive status" report [attached to CR 16], the government's next investigative tactic did not occur until 5-9-84 when it was decided that knowing the disbursement of the funds that the Petitioner borrowed from the bank would be important. The United States Attorney even went as far as obtaining a Grand Jury subpoena to get into the Petitioner's bank records.

Thus, between September, 1982, and May 9, 1984, some 18 months, the only thing the government did was secure a subpoena for the Petitioner's bank records. Actually getting the subpoena took another two months see "prosecutive status" report [CR 16 item No. 13].

The last entry on the "prosecutive status" report, item No. 4, is dated 1-21-86. It says that the Assistant United States Attorney requested a report before rendering a prosecutive opinion. Consequently between September of 1982 and January of 1986, over three years, the government did nothing but obtain a Grand Jury subpoena to investigate the Petitioner's bank records; records that were not even necessary to secure a conviction under 18

U.S.C. §1014.

In the meantime, however, the gems were never taken into custody by the government. In fact the United States Attorney permitted the gems to be sold at a foreclosure auction. [See letter dated May 2, 1984 attached to CR 16, showing that the Assistant United States Attorney and the FBI were consulted about the sale].

To make matters even worse, the bank was the highest bidder at the auction and later the bank sold the gems to a young gem collector from Missoula, Montana, for $500.00 [RT p. 144, ls. 2-10]. The young gem collector testified at the trial that many of the gems that were reported to be in the lot by the government at the trial were missing from the inventory of the gems that he purchased from the bank in August of 1985. For example he testified that on the government's appraisal it said that the actual count of pear shaped sapphires was 191 stones; yet when he received the gems there was only one pear shaped sapphire, 190 were missing [RT p. 153]. Also this 1985 buyer testified that many of the gems that he purchased from the bank were stolen from him sometime during the summer of 1987 [RT pp. 161-162]. Furthermore the government failed to instruct the bank to preserve its written records showing how the gems were handled in 1982 [RT p. 186, ls. 12-14]. Consequently there was no way to tell how many times the gems left the bank [RT p. 185, ls. 6-11].

In a letter dated September 30, 1987, defense counsel asked the United States Attorney for access to the gems so that we could have them appraised by our own expert. The United States wrote back and said that it no longer had possession of the gems [see letter dated October 2, 1987, attached to CR 16]. On November 2, 1987, however, the government's lawyer wrote to defense counsel stating that the gems had been located [see letter dated November 2, 1987, attached to CR 41].

Based on this record we argued for dismissal on the ground that an inordinate amount of time had passed and that the defense was at a "tactical disadvantage" by not having access to the gems for independent appraisal.

Indeed all of the gems were not located by the government. The United States responded to this argument by saying that it was investigating the case as late as April 10, 1987, and that the witness interviews taken at that time were essential to their decision to prosecute [see CR 23, p. 3, ls. 8-18].

The government's justification for delay does not square with the record. The April 1987 interviews were not necessary to the decision to prosecute. There is nothing in the record to show that they were. The government simply did not make out a case of good faith investigative delay. In this connection we invite this Court's attention to its decision in United States -vs- Lovasco, supra, 431 U.S. 795. At footnote 17 the Court states that a reckless disregard of an appreciable risk that a defendant will be impaired in his ability to mount an effective defense can amount to a due process violation.

In affirming the trial court's conclusion that the Petitioner was not at a tactical disadvantage within the meaning of the Lovasco decision the Ninth Circuit held that Petitioner's claimed due process deprivation fell clearly within the purview of Arizona -vs- Youngblood, No. 86-1904, slip op. (U.S. Nov. 29, 1988). Youngblood is the child of California -vs- Trombetta, 467 U.S. 479 (1984). However we contend that the Ninth Circuit panel that decided this case misapprehended the law set forth in Trombetta and Youngblood.

Trombetta and Youngblood are cases that deal with scientific evidence and the governments failure to preserve it. In the text of each of those decisions it clearly states that the government's duty to preserve evidence should be gauged in relation to the defendant's ability to obtain defense evidence by other means. Thus in Trombetta the State of California was not obliged to preserve breath samples in a driving under the influence case. The defendants sought to suppress the breath test results on the ground that the State had failed to preserve the samples used in the test. That argument was rejected by this Court for several reasons. First because the officers

were acting in good faith and pursuant to normal practice; second, in light of the procedures actually used the chances that the preserved samples would have been exculpatory were slim; and, third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence."

Analyzing each of these considerations in this case we contend that the Petitioner here fulfills each and every one of these requirements. Here the government cannot in good faith contend that it followed normal practices in prosecuting this case. This is because the record shows that the government had all that it needed to prosecute in September of 1982 and no later than February of 1983. Yet the indictment was not filed until June 13, 1987, 13 days before the statue of limitation was to expire. For this reason the record shows that the government acted in a reckless manner since it disregarded an appreciable risk that Petitioner would be impaired in his ability to mount an effective defense.

In this connection we emphasize that not only did the United States not seize the gems as evidence at any time during this delay it also permitted the gems to be sold at foreclosure auction. Yet even these deviations from normal prosecutorial routines pale in light of the government's failure to instruct the bank to preserve its written chain of custody record of the gems.[5]

Thus even if this Court would find that the government was acting normally when it delayed prosecution and failed to seize the gems it is impossible to reckon with the fact that the United States failed to obtain the bank's written record that showed how the gems were handled

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[5] We proffered a jury instruction on the issue of chain of custody and on the quality of the investigation by the government that would have permitted the jury to infer that the government's case was much weaker than it might have been. The instruction was refused by the trial court [RT pp. 213, ls. 15-24 & RT p. 214, ls. 55-6] and the refusal was affirmed by the Ninth Circuit [A-3]. In our view this rendered the trial fundamentally unfair. See Arizona -vs- Youngblood, No. 86-1904 slip op. (U.S. Nov. 29, 1988, dissenting op. at 13).

when they were taken into the bank. For this reason we contend that the government acted in a reckless manner and in fact chose to disregard an appreciable risk that the Petitioner in this case would be impaired in his ability to mount an effective defense.

The second prong of Trombetta challenges the defense to show that the evidence would have exculpated the accused. In this connection we contend that the exculpatory value of the evidence that the government failed to preserve rises in proportion to the unavailability of alternative means of demonstrating innocence, which is the third prong of the Trombetta test. In the present case there was no other way to show the value of the gems except by reappraisal of the gems that were delivered to the bank in the first instance. There was no other evidence available to demonstrate innocence. The government relied solely on a belated appraisal of the gems, gems that were missing at the trial, to secure the Petitioner's conviction.[6]

For these reasons the writ should issue.

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[6]It is important to understand that the gems were delivered to the bank by Petitioner on June 29, 1982. Yet, the bank did not have the gems appraised until January, 1984. Moreover in the absence of the bank's written chain of custody record on the gems there is no way to tell whether the gems Petitioner delivered to the bank in June of 1982 were the same ones appraised by the bank in January of 1984. The trial testimony showed this.

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FILED: January 30, 1989

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HELMUT GAENSEL, Defendant-Appellant.	No. 88-3113 DC# CR-87-24-CCL MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
District Judge Charles C. Lovell, Presiding

Argued and Submitted January 12, 1989 - Seattle, WA

Before: WRIGHT, TANG, AND WIGGINS, Circuit Judges

We affirm the conviction of Helmut Gaensel for violation of 18 U.S.C. § 1014, making a false statement for purposes of obtaining a loan. We adopt the reasoning of the district court in Judge Lovell's Memorandum and Order of November 24, 1987, and Memorandum and Order of February 2, 1988.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I. Alleged Errors Relating to the Indictment

We conclude that the district court did not err in ruling that the indictment stated an offense under the statute. There was no error in the denial of Gaensel's motion to discover the grand jury transcript.

Gaensel argues that the government must characterize and prove that a false statement relating to an inflated price or value is a willful overvaluation. That argument was rejected in United States v. Thibadeau, 671 F. 2d 75, 79 (2d Cir. 1982). We adopt the reasoning therein. There is no merit to the claim that the indictment was duplicitous because it joined knowing false statements with willful overvaluations. See id. at 79.

Gaensel charges the government with excessive preindictment delay and with the failure to preserve for trial the gems pledged to the Missoula Bank of Montana and as collateral for a loan of $255,000. He had represented to the bank that the gems had a value of $700,000 and certified that amount in writing. The crime was committed on June 29, 1982. The indictment was returned in June 1987, almost five years after he made the false statement to the bank. before that date, the bank had obtained a civil forfeiture of Gaensel's rights to the gems, bought them at the Marshal's sale and sold them to mitigate its loss on the loan.

In denying Gaensel's motion for dismissal for preindictment delay or, alternatively, for an order suppressing evidence of the gems' value, Judge Lovell noted that the delay was due to investigation and not to gain a tactical advantage. Investigation continued to April 10, 1987, and the prosecutor explain that witness interviews taken then were essential to his decision to prosecute. The ongoing investigation provides a legitimate reason for the delay. United States v. Lovasco, 431 U.S. 783, 797 (1977); United States v. Tornabene, 687 F. 2d 312, 317 (9th Cir. 1982). Gaensel made no persuasive showing of actual, nonspeculative prejudice. See United States v. Moran, 759 F.

2d 777, 782 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986). Dismissal for preindictment delay was properly denied.

It was also proper to deny the motion to suppress. Gaensel failed to show convincingly that the gems would have exculpated him. See California v. Trombetta, 467 U.S. 479, 489 (1984). Their sale was not due to the bad faith of the government. See Arizona v. Youngblood, 109 S. Ct. 333, 337 (1988) (holding that the government's failure to preserve potentially useful evidence did not deny defendant his due process unless he could show bad faith).

We reject summarily the contention that §1014 is vague, overbroad, and unconstitutional.

II. Alleged Errors at Trial

There was no abuse of discretion in excluding Gaensel's proffered expert testimony with reference to the government's failure to establish a reliable chain of custody of the gems. Judge Lovell ruled correctly that the witness was not qualified to express that opinion and that the testimony would have been irrevelant and confusing to the jury.

We also reject the contention that the court erred in refusing to give Gaensel's proposed jury instructions on materiality and chain of custody.

The evidence was sufficient to support a guilty verdict, as Judge Lovell found in his Memorandum and Order of February 2, 1988.

Finally, Gaensel asserts that there was error in giving two Allen charges after the cause was submitted to the jury. Judge Lovell gave supplemental instructions with the assistance of counsel, but they were neither coercive nor remotely like any Allen charge that this court has held to be error.

AFFIRMED. The mandate will issue now.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

****

UNITED STATES OF AMERICA,
Plaintiff,

CR 87-24-M-CCL

-v-

MEMORANDUM
AND
ORDER

HELMUT GAENSEL,
Defendant

****

The above entitled action is before the court on Defendant's several motions to dismiss and motions for discovery. Having been fully briefed the court now rules on the motions.

Discovery Motions

Defendant moves for discovery and inspection of items discoverable pursuant to Fed. R. Crim. P. 16(1)(A)-(D). Defendant's motion is GRANTED.

Defendant moves for disclosure of grand jury minutes on grounds that the grand jury was not aware of the difference between the mens rea requirements "knowingly" and "willfully" contained in 18 U.S.C. §1014. The government to Defendant's motion.

Disclosure of matters occurring before the grand jury may be made by order of a court, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. Fed. R. Crim. P. 6(e)(3)(C)(ii). The party seeking disclosure must demonstrate particularized need which outweighs the policy of grand jury secrecy. United States v. Walczak, 783 F 2d 852, 857 (9th Cir. 196); United States v. Murray,

751 F.2d 1528 (9th Cir. 1985).

Defendant is charged with "knowingly making a false statement," rather than "willfully overvaluing property." Defendant would not have been disadvantaged by any confusion in this area. Therefore, Defendant has not shown a need which outweighs the policy of grand jury secrecy and Defendant's motion is DENIED.

Motions to Dismiss

Defendant's motion to dismiss on grounds that the indictment is deficient on its face is premised on three theories: 1) the indictment contains no concise, definite written statement of essential facts; 2) the statute Defendant is charged with violating contains two distinct offenses with different mens rea requirements and, therefore, cannot be contained in a single count indictment; and 3) the grand jury process was substantially impaired because the grand jury did not know the distinction between the two offenses.

Defendant's argument centers on two different mens rea requirements contained in the statute. Section 1014 of Title 18 makes it a crime to "knowingly make any false statement or report or willfully overvalue any land, property or security" for the purpose of obtaining a loan. 18 U.S.C. §1014. Because the mental states require different proofs, there are two different offenses proscribed by Section 1014. United States v. Davis, 730 F. 2d 669 (11th Cir. 1984).

Defendant claims that the government has mixed the two different offenses in the one count indictment, and as a result the indictment is not only deficient on its face but the grand jury process was substantially impaired because it did not know the distinction between the two offenses.

The indictment charges Defendant with knowingly making a false statement for the purpose of obtaining a bank loan. The indictment goes on to describe the particulars of the offense by alleging that Defendant represented to a bank official the value of the gems pledged as collateral as $700,000 when in fact Defendant knew

that their value was only $7,000 to $14,000.

Defendant relies heavily on United States v. Davis which held that the definition of "false statements" can't be equated with that of "willful overvaluations." Id. at 673. In Davis the Defendant falsely claimed ownership of certain property. The court found that this was a false statement not an overvaluation and went on to dismiss one count of willful overvaluation because the Defendant could not overvalue property he did not own. Id. Defendant claims that the government is in fact charging "willful overvaluation" and in so doing neglected to include the essential element of willfulness in the indictment, confusing the grand jury and Defendant as well.

The government argues that Davis does not preclude it from charging Defendant with knowingly making a false statement when he allegedly overvalued the worth of the gems. Davis merely stands for the proposition that a person cannot be charged with overvaluing property he does not own.

In United States v. Thibadeau, 671 F.2d 75 (2d Cir. 1982) the Second Circuit addressed a fact situation similar to the instant case. In that case the accused listed the incorrect purchase price of a vehicle on a loan form. The accused argued that the representation regarding the purchase price was not a false statement but rather was an overvaluation. The court rejected the argument stating: "The government could prove that the statement as to purchase price . . . was simply false, even though the purchase price of the vehicle may have been inflated and the overvaluation clause of the statute was violated as well." Id at 79.

Defendant also claims that the indictment is duplicitous because it joined knowing false statements with willful overvaluations. The court in Thibadeau also speaks to this issue. ""We have already rejected the basic premise of this argument since the government was not required to characterize the false statement as an overvaluation" Id. In the case at bar the indictment clearly states that Defendant is charged with knowingly making a false state-

ment. The characterization of the false statement does not add the second offense of "willful overvaluation."

Because the court does not find the indictment to be deficient on its face or duplicitous it need not discuss the theory of substantial impairment of the grand jury process. Therefore, Defendant's motion to dismiss the indictment as deficient is DENIED.

Defendant also moves to dismiss on grounds that the indictment was not found within five years from the date of the alleged offense as required by 18 U.S.C. §3282. The indictment alleges that Defendant knowingly made a false statement for the purpose of obtaining a loan on or about June 29, 1982. The indictment was filed with the court on June 17, 1987.

Defendant acknowledges that his company received money from the Bank of Montana on June 29, 1982, but claims that the loan in question was executed in April, 1982. The government indicates its intent to prove that Defendant executed a promissory note and pledged the gems as collateral on or about June 29, 1982. If at the time of trial, the government does not produce evidence which proves the offense charged actually occurred on June 29, 1982, this motion may be renewed.

The crime charged by the government is not time barred as the indictment was filed within five years from the time of the alleged offense. Therefore, Defendant's motion to dismiss is DENIED.

Defendant moves the court for an order dismissing the indictment on grounds that 18 U.S.C. §1014 is unconstitutional on its face because it is vague and overbroad.

Defendant claims that the phrase ". . . for the purpose of influencing in any way the action of . . . any bank" fails to provide adequate notice of precisely what conduct is proscribed. Defendant also claims that the statute is overbroad because it extends to conduct and/or speech that enjoys protection under the law.

The test for vagueness of a statute is whether it fails to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." Palmer v. City of

Euclid, 404 U.S. 544, 545 (1971). This statue gives fair warning that knowingly making a false statement in order to obtain a loan is a criminal act.

Defendant claims that any statement, even flattery, made to influence a loan, if knowingly false, could be a violation of Section 1014 and therefore the statute is overbroad. Although there is room for argument on this issue, case law indicates that the statement must be false as to a material fact. This element narrows the construction of the statute. United States v. Bonnette, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, (1982).

The Ninth Circuit, while not speaking directly to the question of materiality as an element of the offense, did find that false statements regarding a social security number and birth date were material and could properly form the basis for a conviction under 18 U.S.C. §1014. United States v. Phillips, 606 F.2d 884, (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980).

For the above reasons, Defendant's motion to dismiss on grounds of unconstitutionality is DENIED.

Defendant moves for dismissal on grounds of pre-indictment delay and in the alternative for an order suppressing any and all government evidence that pertains to the value of the gems because Defendant has no access to them for reappraisal.

The legislatively enacted statutes of limitations provide the primary guarantee against pre-indictment delay or bringing overly stale criminal charges. United States v. Marion, 404 U.S. 307, 322 (1971). However, delay at the pre-indictment stage is also tested by the general proscriptions of due process. Id. at 324. Pre-indictment delay is permissible unless it violates "fundamental conceptions of justice which lie at the base of our civil and political institutions." United States v. Lovasco, 431 U.S. 783, 790 (1977).

To show a due process violation, the defendant has the burden of showing: (1) that the delay caused actual prejudice to the conduct of his defense, and (2) that the delay was the product of deliberate action by the govern-

ment designed to gain a tactical advantage. United States v. Butler, 792 F.2d 1528, 1533 (11th Cir. 1986). Defendant does not claim any actual prejudice to the conduct of the defense but rather asserts the prejudice comes through the government gaining a tactical advantage.

Investigative delay is not the same as delay solely to gain a tactical advantage over the accused and to prosecute a defendant following investigative delay does not deprive him of due process even if his defense might have been somewhat prejudiced by the lapse of time. United States v. Lovasco, 431 U.S. at 795-96. The government asserts that it was still investigating this case as late as April 10, 1987, and that the witness interviews taken at this time were essential to their decision to prosecute. Plaintiff's Response to Pretrial Motions at 3. Defendant claims the delay was solely for the tactical advantage of the government, and by delaying the prosecution, the government and uncovered a business matter involving Defendant which it intends to use for impeachment purposes should Defendant choose to testify at trial. This forces the Defendant to do more discovery to determine if he should testify in his own defense but does not deprive him of due process. For these reasons, Defendant's motion to dismiss for pre-indictment delay is DENIED.

In the alternative, Defendant asks the court to suppress any and all government evidence that pertains to the value of the gems. Defendant claims that because the government allowed the Missoula Bank of Montana to sell the gems before the Defendant could have them independently appraised, he was denied due process. Defendant asserts that by being denied access to the gems, he has been deprived of evidence that may have proved useful to his case.

The government claims that it never had actual possession of the gems and was not responsible for their sale. The Missoula Bank of Montana obtained a civil foreclosure of Defendant's rights in the gems, purchased them at the Marshal's sale and sold them to mitigate its loss on the loan to the Defendant. The government stated its inten-

tion to introduce documents at trial which it contends were submitted by Defendant to the bank as a legitimate appraisal of the gems. The government also provided Defendant with an appraisal of the gems performed by an expert retained by the bank.

Defendant claims that he should not be held accountable for any appraisal submitted by Defendant because he told the loan officer that he had not had the gems appraised but was relying on what had been represented to him by a third party. Defendant has not complained of the quality of the appraisal done at the request of the bank and he will be able to cross-examine the appraiser at the time of trial. The fact that the gems are missing may make cross-examination more difficult but not impossible.

The Supreme Court in United States v Augenblick, 393 U.S. 348 (1969), suggests that while sanctions should be imposed in cases of bad faith suppression of evidence by the prosecution, exceptions should be made for good faith loss of evidence. Id. While one may question why the government did not initially take the gems into custody, there has been a somewhat successful attempt by the government to locate the gems.

Defendant may file a motion for judgment of acquittal following the presentation of the evidence if there is insufficient evidence to sustain a conviction. The court at this time DENIES the motion for the suppression of evidence pertaining to the value of the gems.

Defendant filed two additional motions to dismiss on November 13, 1987. The government having now filed its response the court rules on the additional motions.

Defendant moves to dismiss the indictment on grounds that two essential elements are missing from the prosecution; that of knowledge of the value of the gems and the lack of materiality of Defendants statements. Defendant claims these defects are defenses capable of determination without trial on the general issues, may be raised before trial by motion, and requests a hearing on the motion.

Defendant cites an article analyzing Rules 12 & 47 of

the Federal Rules of Criminal Procedure and outlining the district court's authority to determine a defense prior to trial.

Speaking Motions: Recognition ff Summary Judgment in Federal Criminal Procedure, 107 F.R.D. 139.

> In United States v. Covington, the Court held that a defense can be determine prior to trial of the general issue "if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense."" United States v. Covington, 395 U.S. 57, 60 (1969).
>
> Id. at 198-99.

Defendant claims these "defenses" can be taken up without trial on the general issues because the court can focus its attention on two very precise lines of inquiry. The court disagrees, these "defenses," lack of knowledge and materiality, are central to the merits of the case and evidence relevant to them must be heard by a jury. If the prosecution does not have sufficient evidence, Defendant can move for judgment of acquittal. Therefore,

Defendant's motion to dismiss and request for a hearing are DENIED.

Defendant further moves for dismissal on grounds of failure to comply with discovery. The items at issue in this motion are: 1) the gems, 2) the "reg-u" form, and 3) tapes of telephone conversations.

As has been previously discussed in this order, the gems were not in the control or custody of the government. While the court questions the government's decision to not maintain control of the gems, it does not find the gem's unavailability to be grounds for dismissal.

The government has pointed out that the "reg-u" form is not in the control or custody of the government. Rule 16(a)(1)(C) only requires the government to disclose documents within the federal government's actual possession, custody or control. United States v. Gatto, 763, F.2d 1040 (9th Cir. 1985). The government indicates that it has informed Defendant of the relevant contents of the document and the government's intent to subpoena the docu-

ment for trial. Once the document is in the custody and control of the government it must be disclosed to Defendant. Id. at 1048; See also, United States v. Adkins, 741 F.2d 744 (5th Cir. 1984).

Finally, Defendant requests discovery of certain tape recordings of telephone conversations of Defendant referenced in FBI reports previously supplied to Defendant. The government's counsel claims that to the best of his knowledge no tape recordings exist and that since they do not exist they cannot be entered as evidence in the government's case in chief. Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure recognizes that the prosecution's actual possession of defendant's statements is not always necessary. If the statements are in the custody of another federal agency, the prosecution must exercise due diligence to discover them. United States v. Bailleaux, 685 F.2d 1105, 1113-14 (9th Cir. 1982). In the case at bar, the government asserts that no such tapes exist. However, should the government, using due diligence, discover the existence of such tapes, it is under a continuing duty to disclose the same to Defendant.

For the above reasons Defendant's motion to dismiss for failure to comply with discovery is DENIED.

On November 17, Plaintiff filed a motion to limine concerning expert testimony. On November 20, Defendant filed a motion for a pretrial hearing to assess the sufficiency of the government's evidence as it pertains to "materiality" and to address the issue of investigative procedures used in relation to the chain of custody of the gems. Defendant also raises questions of admissibility of expert testimony.

The questions of admissibility of expert testimony will be ruled upon at the time of trial. Therefore, Plaintiff's motion in limine is taken under advisement until the time of the trial and Defendant's motion for a pretrial hearing is DENIED.

The clerk is directed to notify counsel of entry of this order. Done and dated this 24th day of November, 1987.

CHARLES C. LOVELL, United States District Judge.

FILED:

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IN THE UNITED STATES COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,	)
	) CR 87-24-M-CCL
Plaintiff,	)
	) 18 U.S.C. §10114
vs.	)
	) $5,000 and/or
HELMUT GAENSEL,	) 2 year
Defendant.	)
	)

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT ONE

That on or about the 29th day of June, 1982, in the State and District of Montana, Helmut Gaensel did knowingly make a false statement for the purpose of obtaining a loan from the Missoula Bank of Montana, the deposits,

a loan from the Missoula Bank of Montana, the deposits, of which are insured by the Federal Deposit Insurance Corporation, in that Helmut Gaensel represented to Mr. Ron Bloomquist, the President of the Missoula Bank of Montana that the assorted gem stones, which he pledged as collateral for a loan from said bank, had a value of $700,000 when in fact, said gem stones had an actual value of only $7,000 to $14,000, as Helmut Gaensel well knew, in violation of 18 U.S.C. §1014.

A TRUE BILL

_____

Foreperson (Betty Ann Gilbert)

_____

United States Attorney
for the District of Montana